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May 20, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Office of the Secretary
Federal Communications Commission
1919 M. Street, N.W., Room 222
Washington, D.C. 20554

Re: Implementation of the Local Competition Provisions
of the Telecommunications Act of 1996
Docket No. 96-98

To Whom It May Concern:

DOCKET FILE COPY ORIGINAL

Please find enclosed for filing in the above proceeding the original and 12 copies of the Comments of Consolidated Edison Company of New York, Inc.

Also enclosed is a copy of the foregoing document and a self-addressed, stamped envelope. Kindly date stamp this copy and return it to me in the envelope provided. Thank you for your cooperation.

Sincerely,

Mary L. Krayeske/kal

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

_____X

In the Matter of)

Implementation of the Local)
Competition Provisions of the)
Telecommunications Act)
of 1996)

CC Docket No. 96-98

_____X

COMMENTS OF CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC.

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**COMMENTS OF CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC.**

Consolidated Edison Company of New York, Inc. ("Con Edison" or the "Company") is a New York State electric, gas and steam utility serving approximately three million customers in New York City and Westchester County. Its service area is relatively small area-wise (about 600 square miles) but its territory encompasses one of the most congested urban areas in the world. The Company's area contains many high-technology companies as well as the world's central financial district, making continued service reliability critically important to the Company's success. Con Edison submits these comments in response to the Notice of Proposed Rule-making ("NPRM") issued by Federal Communications Commission ("Commission") in the above-captioned proceeding. Con Edison is concerned that the Commission use this proceeding to implement rules that are fair to utilities affected by the Telecommunications Act and to ratepayers of these companies from the perspective of both reliability and economics.

The Telecommunications Act of 1996 ("Telecommunications Act"), Pub. L. No. 104-104, 110 Stat. 56 (1996) provides a framework to deregulate the telecommunications industry by removing existing legal barriers for potential participants in the industry. The legislation requires that all new and existing industry participants be "interconnected" through access to existing or new facilities. Consequently, a pro-competitive, deregulated industry will be encouraged, with the objective of bringing flexible choices and decreased prices for consumers. In addition to providing telecommunication industry competitors the right to use existing facilities, the law also mandates that other utilities allow telecommunications industry participants access to its poles, ducts, conduits, and right-of-ways ("facilities").

This mandate, allowing telecommunications carriers and cable television systems ("providers") to use utility facilities in order to provide telecommunications or cable television services to customers, is expected to induce competitors to enter into the telecommunications business. The law states that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit or right-of-way owned or controlled by it." (Telecommunications Act, § 703 (f)(1)). In addition, the Telecommunications Act states that "a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is

insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes" (Tele-communications Act, § 703 (f)(2)).

To implement these provisions, the Commission has instituted a proceeding aimed at establishing a competitive telecommunications industry by implementing the "interconnection provisions" of the Telecommunications Act. Included in the "interconnection" portion of the Telecommunications Act are the sections of the law dealing with access to utility facilities. The Commission has requested comments from interested parties regarding the interconnection provisions of the Telecommunications Act, including the requirement that utilities provide access to its facilities.

Con Edison's comments are limited solely to the provisions of the Telecommunications Act and the NPRM dealing with the mandated access to poles, ducts, conduits, and rights-of-way.

Summary of Con Edison's Position

Con Edison's comments reflect its concerns regarding the questions raised in the NPRM. As a basic position, Con Edison believes that its ratepayers should not be adversely harmed by the Telecommunications Act's mandatory access provisions. A quick overview of the Company's position is that the Telecommunications Act's requirement that providers be granted "nondiscriminatory access" means that a utility cannot discriminate against a

provider in an undue or discriminatory manner. The Company also maintains that the requirement that a provider attach to Con Edison's system should not impair the reliability of Con Edison's system. Regarding the insufficient capacity, there is no standard by which to determine what this would be for each utility. Similarly, there is no method to determine a reliability level standard either. Finally, Con Edison believes that a utility must maintain its ability to modify or add to its facilities.

Non-Discriminatory Access

The Telecommunications Act states that a utility shall provide "nondiscriminatory access" for both telecommunications carriers and cable television systems (jointly referred to as "providers") to certain facilities -- poles, ducts, conduits, and rights-of-way. The NPRM (§ 222) requests comments as to the meaning of the phrase "nondiscriminatory access" in this part of the Telecommunications Act.

This phrase -- "nondiscriminatory access" -- simply implies that all providers requesting to attach to a utility's pole, duct, conduit or right-of-way cannot be discriminated against in an undue or improper manner. Con Edison believes that the phrase "nondiscriminatory access" means that all providers must be treated in a reasonable, non-arbitrary manner when requesting to attach

equipment to one of the four types of facilities -- poles, ducts, conduits or rights-of-way.

Under a "nondiscriminatory access" standard, a utility is permitted to make reasonable decisions based on the circumstances of the attachment. For instance, providers can be expected to seek to attach different technologies to different points of the utility's system; they will request different rights from Con Edison for different durations for varied operations and technologies; and there will be differing levels of risk presented. It is due to the fact that myriads of different situations will be presented under the Telecommunications Act that different factors will be germane to the various requests for attachment that are to be expected. The Commission should permit differing terms and conditions for attachment where different terms are attributable to the circumstances of the proposed attachment. For example, a provider requesting to attach to 50 poles in a remote area of Con Edison's service area is not making the same request as a provider desiring to attach to critical facilities in the central financial district of New York City. The risks involved in these situations are not comparable nor is the risk of outage or operating difficulties resulting from congestion the same, nor is the level of potential claims in the event of an outage or other operating problem. "Nondiscriminatory access" should be reasonably and fairly interpreted to accommodate differences in circumstances and operating environments.

"Nondiscriminatory access" must, at a minimum, include provision for an applicant for access to meet reasonable standards -- from operating, financial and engineering standpoints -- in order to attach. These standards should allow that a utility is only required to provide access to a responsible provider, that is, a provider capable of meeting all standards reasonably necessary to leave the affected utility and its ratepayers at least neutral to the proposed attachment. Neutrality is a critical criterion because the costs and operating issues of one industry should not be addressed by shifting them to another industry. If the provider is unable to meet reasonable terms and conditions, required to effectuate neutrality, an electric ratepayer subsidy to the telecommunications industry would result. In the evolving competitive electricity environment, this type of subsidy should not be permitted to be created and electric ratepayers should not bear the risks associated with the telecommunications industry.

A related issue is that the Commission should be deliberate in refraining from expanding on utility obligations imposed by the Telecommunications Act. The access requirement extends to poles, ducts, conduits and rights-of-way. The standard does not extend to other utility facilities such as generating stations, transmission towers or utility meters. The attachment obligations imposed on utilities are significant, and these obligations should not be expanded into areas not addressed by Congress.

Safety, Reliability and Engineering

The NPRM (§ 222/223) also requests comments as to specific safety, reliability and engineering concerns that may be the basis for an entity to be denied access to facilities. Con Edison believes that the reliability and safety of its distribution system is paramount, and these concerns must take precedence over any requirements that providers be permitted to attach to its facilities. Con Edison's primary function is to provide ratepayers with electric, gas, and steam service. The provision of these services to customers is first and foremost. Access to facilities will be provided, but such access cannot impinge the utility's paramount duty of providing safe, adequate and efficient service to its customers.

In allowing providers to attach to utility facilities, the Commission should recognize that electricity is an inherently dangerous commodity. Individuals working in close proximity to live electric cables need to be properly educated in working in that area. Utility personnel working on cables have been trained in this function but employees of telecommunications and cable companies have no such formal training working with live electric cables -- this is both a safety and reliability concern. This concern is even greater in the context of conduits and ducts where, conceivably, the providers' employees would seek the right to work right next to live electric cables. At least when working on a pole, there is a safety zone of 40 inches between electric cables and other cables, there is no such "safety zone" in a conduit or duct. There are several safety and reliability

concerns which lead Con Edison to the conclusion that the ability of Con Edison to provide access to ducts and conduits consistent with safe and reliable operation of its utility system will be very limited.

Providing and coordinating access in conduits and ducts is labor intensive. Utility employees would need to supervise all work and to provide support services, such as "flushing" the area out. Especially in congested areas where access or installation could be required on virtually a daily basis, the resulting manpower commitment and cost could be substantial.

Specific concerns respecting work in ducts and conduits relate to maintenance and installation work and the potential need to take utility equipment out of service in order to accommodate such action. The problems and enormous cost and complexity of monitoring and accommodating duct and conduit work, particularly in the highly congested and reliability-critical central business district of New York City, makes the provision of such access, to a significant extent, impracticable.

Even more important than the resulting cost and inefficiency, is the potential danger to the reliability of service. Access to ducts and conduits by another set of wires, installed by workers unfamiliar with the existing system and its unique characteristics, creates the danger of accidents and other occurrences (wear and tear due to usual subsurface conditions such as melting roadsalt) that could lead to service interruption.

Accordingly, the Commission should recognize the substantial limitations on the opportunity to make use of existing utility ducts and conduits. The Commission should find that it is not in the public interest to jeopardize utility service by requiring access to conduits and ducts where such access would be inefficient or impractical from an emergency standpoint or where such access is determined by the utility to pose danger to the safety or reliability of the system.

Finally, the Commission should also address the procedures to be followed in providing access. Applicants for access will be required to coordinate with the utility in addressing each attachment. Provided attachment requests are addressed in good faith, utilities must retain the right to decline access when appropriate to maintain the reliability and efficiency of the utility system. Attaching parties must be prepared to recognize that the work priority of a utility company must at all times be the customers of the utility and the customers' interest in reliable, efficient service.

Insufficient Capacity

The Telecommunications Act provides that "a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights of way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." (Telecommunications Act, §703).

The NPRM (§ 223) requests comments about specific standards regarding insufficient capacity – what can be used to determine "insufficient capacity?"

Insufficient capacity means different things depending on the facility involved. For example, Con Edison generally maintains 25 percent of the remaining available space in its ducts and conduits on reserve. This extra space is designed to allow room in the conduits for other, additional utility equipment, needed due to load growth or any other reason. The cost and expense of constructing additional conduits and ducts necessitates the adoption of the 25 percent standard. To protect its ratepayers' interest, Con Edison intends to maintain that operating criterion in processing attachment applications. Thus, the Company would permit a provider access to its conduit and duct facilities if there is any space remaining after determining its 25 percent reserve factor. A provider would be denied access if there was not an additional 25 percent reserve on the grounds that it has insufficient capacity in the conduit or duct.

Poles, on the other hand, have minimum clearance requirements on the bottom, a safety zone on the top (between other cables and electricity cables – 40 inches) and a generally accepted industry practice of maintaining 12 inches between cables. This leads to a finite amount of space on a pole. If the entity wanted to attach and there was no room remaining, the entity would be denied on the ground of insufficient capacity. Of course, the entity always has the option to pay replacement cost for a higher pole.

Regarding the NPRM's question as to whether the Commission should mandate minimum or quantifiable threats to reliability before access can be denied (§ 223), a standard of this type is unworkable. Reliability levels differ based upon the location of the utility and its network -- what one region of the country considers to be an acceptable level of reliability may be unacceptable in another region. For instance, Con Edison has the highest level of system reliability in the U.S. -- and our customers have come to expect a level of reliability greater than that which prevails in other regions. A factor or a range of factors will not take into account differences in individual utility systems. Furthermore, in Con Edison's situation, in its latest rate settlement with its state regulatory agency, a minimum reliability threshold has been established (NY PSC Case No. 94-E-0334, Op. No. 95-3, Apr. 16, 1995). If the Company fails to meet this standard, its rate of return may be jeopardized since the Company would be hit with a penalty and unable to earn the rate of return projected under this agreement. A minimum or quantifiable threat "factor" is incompatible with these concerns.

Comments have also been requested as to whether the Commission should establish regulations expressly imposing the burden on the utility to justify its denial of access to a provider (§ 223). There can be no doubt that the requesting provider should bear this burden. A utility is required under the Telecommunications Act to provide access but if it denies access due to a need to protect its system integrity, there is no basis for imposing on the utility the burden

of showing that its determination is reasonable. Telecommunications providers, which are generally well financed and sophisticated businesses are in no need of such unreasonable and arbitrary procedures in asserting their rights, particularly as against highly regulated utilities making determinations respecting system integrity. A rule that would thrust on utilities the burden of proving the reasonableness of their determinations not only violates the basic tenet of regulatory law that a utility's actions are presumptively reasonable, but it would in and of itself endanger system integrity, safety, reliability and system integrity. Safety, reliability and system integrity, vital as they are, do not always lend themselves to numerical or objective quantification and while these determinations should be supportable, a burden of proof requirement would as a practical matter undermine the utility's ability to rely on engineering judgment in operating its system.

¶ 223 also inquires as to whether the Commission may, or should, establish regulations to ensure that a utility fairly and reasonably allocates capacity. The answer is no, again, because such regulations or standards could not anticipate the many factors and circumstances that will be presented under the Act.

Modifications to Poles

In the same vein, the Telecommunications Act also requires that "whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such

pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained such attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add or modify its existing attachment. Any entity that adds or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible." (Telecommunications Act, § 703(h)). The NPRM (§ 225) requests comments on several issues surrounding this portion of the law.

First, the NPRM (§ 225) requests comments as to whether the Commission should establish requirements regarding the manner and timing of the notice to ensure that a provider has a "reasonable opportunity" to add or modify its attachment. Although Con Edison has a program which establishes a timetable for replacing facilities and this type of replacement would be known in advance, the Company does not have a crystal ball which predicts facilities that may need to be replaced on an emergency basis. Generally, Con Edison believes a one to two week period of notification would allow a provider "reasonable opportunity" to add or modify its attachment. It is important, however, that any time requirement be stated as a general rule and not an absolute requirement due to the practical operating realities faced by utilities. Utility companies very often need to replace or modify poles on short notice due to accidents or bad weather. Attaching entities should not be in a better position than the pole-owning utility. If poles

need to be modified or replaced on short notice due to accident, weather or similar cause, all affected will have to deal with their equipment and no advance notice rule can apply. Again, this is required both out of fairness and out of concern for subsidization by utility ratepayers. Thus, any notice requirement would not apply to an emergency situation such as an underground smoking condition, decayed or defective pole.

Second, comments are requested as to whether to establish rules determining what a "proportionate share" of the costs borne by each entity would be (§ 225). Currently, existing New York pole attachment contracts allow for a time-based standard in paying for modification costs. If a utility causes an attachment to be modified within 2 years after an attachment, then the utility is responsible for the cost of the modification. (However, if it is the attaching entity, then the provider would be responsible for these costs.) Then, if a modification is made after two years, the provider is required to pay the costs of the modification. This is a reasonable compromise which is currently used in New York and is an accepted practice. The Commission should require a similar standard.

Third, the Commission asks for comments as to whether any payment for costs should be used to offset an owner's potential revenue increases. The answer is no. The facility belongs to the utility and as such it should be permitted to receive any revenues from the provider's use of its facilities. In any event, this is

a ratemaking issue for state public utility commissions that regulate utilities and not a matter for this Commission to promulgate rules to implement.

Finally, comments are requested as to whether limitations should be imposed on an owner's right to modify a facility and collect a proportionate share of the costs. The facility's owner currently has the ability to make decisions regarding modifying a facility. This should not be changed since the primary purpose of the facility is to provide electric, gas or steam service, and presumably a modification would be necessary to provide better service to its customers.

Conclusion

For the reasons set forth herein, the Commission should adopt policies for attaching providers equipment to utility facilities consistent with Con Edison's concerns.

Respectfully submitted,

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